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Nos. 82-524, 545 and 551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BALTIMORE GAS AND ELECTRIC CO., *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

COMMONWEALTH EDISON COMPANY, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the Court of Appeals complied with the mandate of this Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), to determine "whether the challenged rule finds sufficient justification in the administrative proceedings . . . ."

Whether, assuming the Court of Appeals complied with that mandate, it correctly concluded that the Nuclear Regulatory Commission's administrative proceedings, taken as a whole, did not provide this justification.

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BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of petitions for a writ of certiorari submitted by Baltimore Gas and Electric Co.,

et al. ("Baltimore") on September 24, 1982, by the United States and the United States Nuclear Regulatory Commission ("Government Petitioners") on September 27, 1982, and by Commonwealth Edison Co., *et al.* ("Commonwealth Edison") on September 28, 1982.[1] Petitioners seek the United States Supreme Court's ("the Court") review of a decision by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") which holds that the Nuclear Regulatory Commission's ("NRC") generic evaluations of the environmental impacts of the uranium fuel cycle are invalid because they fail to allow for proper consideration of the uncertainties concerning those impacts.[2] *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 685 F.2d 459, 467 (D.C. Cir. 1982) (*"Vermont Yankee III"*),[3] Pet. App. 11a.

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 99.6 percent of all customers of the investor-owned segment of the utility industry and 77 percent of the nation's electricity users. EEI's member companies currently operate 69 of the nation's 80 nuclear power plants licensed to operate by the NRC and expect to operate an additional 61 nuclear units now under construction or

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[1] EEI has obtained the written consent of all parties to this case to the filing of this brief. The written consents have been filed with the Clerk of this Court.

[2] Relevant activities associated with the fuel cycle are explained in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 547 F.2d 633, 637 n.3 (D.C. Cir. 1976) (*"Vermont Yankee I"*), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (*"Vermont Yankee II"*), and in Commonwealth Edison Pet. 3-4 n.1.

[3] Copies of the opinions of Senior Judge Bazelon, Judge Edwards and Judge Wilkey appear in the Appendix filed by Baltimore ("Pet. App.").

in planning.[4] Nuclear power from all sources produced approximately 10.9 percent of the nation's electricity in 1980, the latest year for which figures are available, and during that same year nuclear power from EEI's member companies produced 9.3 percent of all domestic electricity generated.[5]

EEI's members have the obligation as public utilities to meet the future power needs for most of our nation's electricity users. On a continuing basis electric utilities have a responsibility to develop new generating capacity to meet increased demand and replace existing capacity. Because significant new capacity from hydroelectric resources is limited, oil and natural gas are expensive, and oil is especially vulnerable to interruption of foreign supplies, much of this new capacity will be fueled by nuclear and coal for the foreseeable future. In enacting the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* (1976), the Congress encouraged the commercial development of nuclear power to meet the nation's need for electric energy. More recently, President Reagan has described nuclear power as "[o]ne of the best potential sources of new electrical energy supplies in the coming decades . . . ." Statement Announcing a Series of Policy Initiatives, 17 Weekly Comp. of Pres. Doc. 1101 (Oct. 8, 1981).

Because of the significance of nuclear power in meeting domestic energy needs, this case is important to EEI's members. The Court of Appeals' decision holds that the NRC's analysis of the environmental impacts of the nuclear fuel cycle in generic informal rulemakings fails to consider properly the uncertainties associated with the uranium fuel cycle as required by the Administrative

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[4] U.S. Nuclear Regulatory Commission, *Facilities License Application Record*, NUREG-0652, Vol. 1, No. 3 (February 1982) (updated through October 20, 1982).

[5] Edison Electric Institute, *Statistical Yearbook of the Electric Utility Industry/1980*, at 20, 21 (1981).

Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* (1976), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* (1976).

As a result of this decision, the licensing process could be subject to significant delays and inconsistent determinations. This would be particularly serious for EEI's members who expect to operate the majority of the plants for which applications for construction permits or operating licenses are pending or will be sought.

In addition, this decision could affect all nuclear plants currently in operation. The Court of Appeals has recently indicated that the NRC, pursuant to its continuing regulatory responsibility over nuclear power plants, has the obligation to update its analysis of the environmental impacts of operating such plants to reflect significant new information or new circumstances. *People Against Nuclear Energy v. Nuclear Regulatory Commission*, 678 F.2d 222, 231-232 (D.C. Cir. 1982), *petitions for cert. pending*, Nos. 81-2399 and 82-358 (*"PANE"*). While EEI disagrees with this rationale, attempts may be made to require the NRC to conduct analyses of fuel cycle impacts for all nuclear plants, even those which were not explicitly conditioned upon the fuel cycle rule. Even if the *PANE* court's rationale were not applied, the decision in the instant case could affect the 90 licenses and permits issued since the first fuel cycle rule was promulgated in April, 1974. Government Petition For Rehearing and Suggestion For Rehearing En Banc at i, *Vermont Yankee III*. Although the Court of Appeals did not decide the impact of its invalidation of the fuel cycle rule upon those licensees (Pet. App. 69a), its invalidation of that rule could affect those operating plants. Thus, it may be necessary to reopen proceedings for all such plants.

Even before the Court of Appeals' decision, the NRC's administrative process for the licensing of nuclear power plants was widely recognized as excessively cumber-

some.[6] By imposing roadblocks to the NRC's exercise of its licensing responsibilities, the Court of Appeals exacerbates the burdens of the NRC licensing process and constrains the ability of the NRC to develop more efficient procedures. These impediments to the NRC's administration of its responsibilities under the Atomic Energy Act impose substantial costs and burdens upon nuclear operations to the detriment of the nation and of EEI's members who have a responsibility to plan and operate an efficient electric generation system. Among these costs are the costs of delay identified by Commonwealth Edison (Pet. 14 n.17) and the increased costs of utility financing attributable to the perceived risks arising from such judicially created impediments.

This brief *amicus curiae* discusses the major issues raised by the Court of Appeals' decision from the perspective of their broad policy implications for the proper and efficient administration of the Atomic Energy Act and NEPA. It shows that Supreme Court review is essential to reaffirm the basic tenets set forth in *Vermont Yankee II*.

SUMMARY OF ARGUMENT

In view of this Court's unanimous holdings in *Vermont Yankee II*, the Court of Appeals' limited task was simply to determine whether the Table S-3 rules had sufficient justification in the administrative proceedings to be upheld. Yet the challenged rules—which have been 10 years in the making—are before this Court once again because the Court of Appeals' decision ignores the clear directives of this Court. The Court of Appeals erred by judging the adequacy of the record to support the challenged rules only on the basis of the NRC's treatment of two iso-

[6] In October, 1981, President Reagan specifically recommended that the nuclear licensing process be streamlined to "remove unnecessary obstacles to deployment of the current generation of nuclear power reactors." Statement Announcing a Series of Policy Initiatives, 17 Weekly Comp. of Pres. Doc. at 1102.

lated uncertainties rather than the composite formulation of interdependent impacts of the nuclear fuel cycle. The Court of Appeals also improperly imposes upon the NRC procedural requirements not specified in NEPA.

This decision questions, at least implicitly, congressional judgments as to the desirability of the commercial development of nuclear power and the manner in which such development will proceed. Essentially, the decision is a "giant step sideways" from the analysis unanimously rejected by the landmark *Vermont Yankee II* decision. This Court should take this opportunity to reaffirm the Court of Appeals' limited role in reviewing decisions of the NRC and affirm the NRC's substantive determinations of generic environmental values.

ARGUMENT

In *Vermont Yankee II*, this Court unanimously remanded the original rule in this case to the Court of Appeals solely to determine "whether the challenged rule finds sufficient justification in the administrative proceedings . . ." and directed the Court of Appeals not to substitute its judgment for that of the NRC or to impose upon the NRC procedural requirements beyond those specified by the APA and NEPA. Because the NRC has followed essentially the same procedures in subsequently adopting interim and final Table S-3 rules, the principles upon which this Court instructed the Court of Appeals to limit its review of the original rule should apply as well to that court's review of the interim and final Table S-3 rules. The Court of Appeals' decision ignores these principles with respect to all three rules.

1. In November, 1972 the predecessor agency to the NRC (the Atomic Energy Commission) began what was to become a series of rulemakings to collect and summarize information on the environmental effects of each step in the uranium fuel cycle associated with operation

of nuclear power plants. In order to expedite the ever-lengthening process involved in constructing and licensing nuclear plants,[7] the NRC adopted its original Table S-3 rule (currently 10 C.F.R. § 51.20(e) (1982)) through an informal rulemaking.[8] Of primary importance to this case is the portion of Table S-3 relating to the generic treatment of the potential release of radiological effluents and the assignment of values to the releases for use by individual licensing boards. After the original rule was successfully challenged in *Vermont Yankee I*, this Court unanimously remanded the case solely to determine whether there was an adequate basis in the administrative record to uphold the rule. *Vermont Yankee II*, 435 U.S. at 549. This Court instructed the Court of Appeals to conduct its review in accordance with the traditional standards of Section 10(e) of the APA, 5 U.S.C. § 706 (1976), and with NEPA and not to substitute its judgment for that of the agency on substantive matters. *Id.* at 535-537 n.14, 549 n.21.

In addition, this Court stated in *Vermont Yankee II* that the Court of Appeals was not permitted to overturn the rulemaking proceeding on the basis of procedural devices employed or not employed by the NRC "so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case." *Id.* at 548. It emphasized that NEPA's mandate

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[7] The construction and licensing of a nuclear plant requires an average of 12 to 14 years today, as compared to five years in the early 1960s. Washington Post, Oct. 16, 1982, at A12, col. 5 (quoting Dr. Shelby Brewer, Assistant Secretary for Nuclear Energy, U.S. Department of Energy).

[8] Over the past decade, the NRC has continued to refine and clarify the Table S-3 rule and its application as additional information has become available and as additional policy judgments have been made. The NRC's most recent consideration was formulated in what is referred to as the "final" Table S-3 rule. Therefore, EEI's brief primarily focuses on this "final" Table S-3 rule.

"is essentially procedural . . . . It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals . . . would have reached had they been members of the decision-making unit . . . ." *Id.* at 558 (citations omitted). This Court has recently reemphasized these principles, stating, "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-228 (1980), *quoting Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

2. The Court of Appeals focuses upon the NRC's decision to assign zero value to the uncertainties associated with the environmental impacts of the long-term storage of high-level wastes. However, the Court of Appeals fails to acknowledge that the NRC did not consider this issue in isolation from the other environmental impacts of the uranium fuel cycle discussed in the Table S-3 rules. The function of the Table S-3 rulemakings was to consider and assign numerical values to the environmental impacts of the overall uranium fuel cycle. The judgment which the NRC reached as to the long-term storage of high-level wastes is dependent upon judgments which it made as to the impacts of earlier stages of the fuel cycle.

In assigning a "zero-release" value to the long-term storage of high-level wastes, the NRC thoroughly considered the various uncertainties underlying this issue. With respect to one uncertainty, the likelihood of finding a repository,[9] the NRC found in the notice of final rule-

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[9] The likelihood of waste storage being accomplished safely is being addressed in depth in the NRC's "waste confidence" proceeding (44 *Fed. Reg.* 61,372 (1979)) and has been the subject of

making that salt deposits have been discovered in 24 states and that the "characteristics of a bedded-salt repository afford a reasonable basis for the staff's conclusion that the repository can maintain its integrity . . . ." Pet. App. 366a & n.22. Since no specific sites have as yet been selected, the NRC characterized the evidence in the record as "tentative but favorable." *Id.* at 366a. It concluded:

> Such general evidence, coupled with the absence of any strong argument that a site cannot be found, probably affords as strong a record as can be made on the issue until a specific site has been thoroughly investigated and found to be suitable.

Id. (footnote omitted).

With respect to another uncertainty, whether the permanent repository would perform as expected, the NRC's judgment was influenced by its intentionally conservative calculations of the environmental impacts of the uranium fuel cycle. For example, it exaggerated the amount of fuel consumed and underestimated the efficiency of protective devices. Pet. App. 288a-289a. The NRC also assumed, conservatively, the scientifically impossible release of all gaseous radionuclides by all fuel elements before a permanent repository is sealed. *Id.* at 364a-365a & n.20.

Having used a compound series of conservative assumptions as to impacts of the fuel cycle before sealing of a permanent repository, the NRC examined the potential post-sealing impacts. The NRC determined that such impacts involved "very low probability catastrophic events" and that more likely occurrences, such as leakage of water, would take "tens of thousands of years" to transport radioactivity out of the repository area. Pet. App. 369a-370a. The NRC concluded that "[g]iven the staff's

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extensive congressional consideration (Pet. App. 138a n.60 (Wilkey, J., dissenting)). See Commonwealth Edison Pet. 13 n.16.

assumption that volatile fission products are totally released before the repository is sealed . . . taking post-sealing releases as zero does not significantly reduce the overall conservatism of the table." *Id.* at 370a. Thus, as Commonwealth Edison states (Pet. 24) the overall conservatism of the NRC's analysis of the pre-sealing impacts of the fuel cycle more than compensates for any lack of conservatism as to post-sealing impacts.

The fundamental error in the Court of Appeals' analysis is its failure to consider the NRC's conservative conclusions with respect to the earlier fuel cycle impacts. Had the Court of Appeals based its analysis on the record as a whole, it should have concluded that the NRC came to a fully informed and well-considered judgment as to the generic treatment of the uranium fuel cycle.

3. The Court of Appeals repeatedly holds that the NRC did not "properly consider" the environmental costs of the uncertainties associated with the uranium fuel cycle, but never precisely explains the kind of consideration necessary to comply with NEPA.[10] Nonetheless, the Court of Appeals acknowledges that "the NRC, particularly in promulgating the final rule, has disclosed the nature of many of the uncertainties . . . ." Pet. App. 48a. Moreover, as we have shown above, the record, taken as a whole, demonstrates that the NRC has thoroughly considered and disclosed these costs as they relate to the other aspects of the fuel cycle. NEPA requires no more.

The Court of Appeals' rejection of the procedural format through which the NRC chose to consider these costs conflicts with this Court's endorsement of the NRC's procedures in *Vermont Yankee II*. 435 U.S. at

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[10] In *Vermont Yankee II* this Court stated that it is "no mean feat" to "determine exactly what result" the Court of Appeals reached in *Vermont Yankee I*. 435 U.S. at 539. It is at least equally difficult to determine what the Court of Appeals requires in *Vermont Yankee III*.

535 n.13. As Judge Wilkey states, courts "may not, under the guise of close scrutiny for procedural compliance, dictate to the agencies just *how* [NEPA] consideration is best made." Pet. App. 163a (emphasis in original). Instead, agencies are to be accorded the "greatest deference" in structuring their own proceedings. *Id.*

This Court has repeatedly articulated with respect to the APA that "agencies should be free to fashion their own rules of procedure." *Vermont Yankee II*, 435 U.S. at 544. This principle is equally applicable to NEPA. For the Court of Appeals to impose its notion of the "best" procedures upon the NRC to satisfy NEPA would intrude upon the agency's authority to structure its own proceedings.

Essentially, the Court of Appeals' disagreement with the NRC is not that the agency failed to consider and disclose the uncertainties associated with long-term storage of nuclear wastes, but that those uncertainties were not considered in a manner which the Court of Appeals would have preferred. Pet. App. 46a; see also *id.* at 164a (Wilkey, J., dissenting). We agree with Judge Wilkey:

> A close examination of the majority's opinion today reveals that it has taken no more than a giant step sideways from an analysis rejected unanimously by the Supreme Court in *Vermont Yankee II*. It matters little that Judge Bazelon's latest approach has taken on a slightly different form or is presented under a different banner than his analysis in *Vermont Yankee I*. Its focus and effect are unchanged. *Vermont Yankee III* does not cure the first-round defects of *Vermont Yankee I*; it compounds them.

Id. at 180a.

4. The Court of Appeals' decision also questions, at least implicitly, the wisdom of Congress in encouraging development of nuclear power through enactment of the

Atomic Energy Act of 1954.[11] However, as the Court of Appeals has been told before by this Court, that congressional decision is not to be questioned by a reviewing court.

> The fundamental policy questions appropriately resolved in Congress . . . are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.

Vermont Yankee II, 435 U.S. at 558 (emphasis in original).

To supervise the implementation of its decision Congress delegated broad regulatory authority to the NRC. See, *e.g.*, 42 U.S.C. § 2201 (1976). In response, the agency has adopted elaborate procedures and acquired extensive expertise designed to protect the health and safety of the public. Using its expertise, the NRC must frequently exercise its judgment and make difficult factual and policy choices. As in the instant case, many of the judgments cannot be based on conclusive scientific proof. Indeed, as Judge Wilkey points out, an agency may have a duty to promulgate regulations based only on predictions. Pet. App. 157a-158a & n.116 (Wilkey, J., dissenting), *citing International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629 (D.C. Cir. 1973). The NRC must also adopt procedures best suited in its judgment to achieve the statutory objectives. The Court of Appeals has recognized that the NRC's regulatory scheme as "vir-

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[11] Section 3 of the Atomic Energy Act states:

> It is the purpose of this Act to effectuate the policies set forth above by providing for—
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> * * *
>
> (d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public[.]

42 U.S.C. § 2013 (1976).

tually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). To the extent that the NRC properly exercises its congressionally conferred responsibilities and discretion, courts may not interfere. To do otherwise would abrogate the separation of congressional, executive and judicial functions.

The Court of Appeals in its decision below has crossed the boundary between proper judicial and agency functions and has questioned the wisdom of Congress itself with respect to its decisions as to whether and how to develop nuclear power. Therefore, EEI agrees with Judge Wilkey that the Court of Appeals has "effectively taken over control of the nuclear industry." Pet. App. 181a. This Court should hear this case in order to reaffirm that the decision whether to continue development of nuclear power is for Congress to make and that the manner in which such development is to proceed is within the authority of the NRC to decide, consistent with the statutory minima prescribed by Congress.

CONCLUSION

EEI respectfully urges that the petitions for certiorari be granted.

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